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Emek Sadot

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* EMEK SADOT

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Appeal 2011-003273  
Application 10/072,364  
Technology Center 2100

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Before ELENI MANTIS MERCADER, ERIC B. CHEN, and  
DANIEL N. FISHMAN, *Administrative Patent Judges*.

FISHMAN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) from the final rejection of claims 1-54. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

## STATEMENT OF THE CASE

### *The Invention*

Appellant's invention relates to selecting a server to represent a virtual server hosted by a plurality of servers by providing a load balancer, not associated with the virtual server, parameter values pertaining to the plurality of servers. *See generally* Abstract.

Claim 1, reproduced below, is illustrative:

1. A method of selecting a server to represent a virtual server hosted by a plurality of servers, comprising:

providing, by a load balancer not associated with the virtual server, values, for one or more parameters, of two or more paths, each path defined between a point in a vicinity of a client accessing the virtual server and one of the plurality of servers representing the virtual server; and

selecting a server to provide data for the client, responsive to the values of the one or more parameters,

wherein the load balancer comprises a client-controlled load balancer that directly selects said one of the plurality of servers representing the virtual server based on said one or more parameters.

### *The Rejections*

Claims 1-4, 6-9, 11, 15, 17, 24-29, and 32-36 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel (U.S. Patent No. 6,182,139

B1; issued Jan. 30, 2001) and Joffe (U.S. Patent No. 6,185,619 B1; issued Feb. 6, 2001). Ans. 4-12.

Claim 5 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel, Joffe, and Zaumen (U.S. Patent No. 6,658,479 B1; issued Dec. 2, 2003, filed June 30, 2000). Ans. 12.

Claim 10 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel, Joffe, and Schulter (U.S. Patent No. 7,174,390 B2; issued Feb. 6, 2007, filed Jan. 4, 2002). Ans. 12-13.

Claim 12 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel, Joffe, and Cohen (U.S. Patent No. 6,389,462 B1; issued May 14, 2002, filed Dec. 16, 1998). Ans. 13-14.

Claims 13, 14, 30, and 31 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel, Joffe, and Rune (U.S. Patent No. 6,304,913 B1; issued Oct. 16, 2001). Ans. 14-16.

Claim 16 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel, Joffe, and Zisapel (U.S. Patent No. 6,249,801 B1; issued June 19, 2001). Ans. 16-17.

Claims 18-21 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel, Joffe, and Yousefi'zadeh (U.S. Patent No. 6,950,848 B1; issued Sept. 27, 2005, filed May 5, 2000). Ans. 17-19.

Claims 22 and 23 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel, Joffe, Yousefi'zadeh, and Ebrahim (U.S. Patent No. 6,154,777; issued Nov. 28, 2000). Ans. 19-20.

Claims 37-40 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel and Zaumen. Ans. 21-22.

Claims 41-45 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel and Ebrahim. Ans. 23-25.

Claim 46 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel, Ebrahim, and Cohen. Ans. 25-26.

Claims 47, 50, and 51 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel and Yousefi'zadeh. Ans. 26-28.

Claims 48 and 49 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brendel, Yousefi'zadeh, and Ebrahim. Ans. 28-29.

Claim 52 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Ballard (U.S. Patent No. 6,078,960; issued June 20, 2000) and Joffe. Ans. 30-31.

Claim 53 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Ballard, Joffe, and Ebrahim. Ans. 31-32.

Claim 54 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Ballard, Joffe, and Vange (U.S. Patent No. 7,043,563 B2; issued May 9, 2006, filed Apr. 16, 2001). Ans. 32.

## ISSUES

Appellant's arguments present us with the following dispositive issues:

1. Has the Examiner failed to establish a prima facie case of obviousness for every § 103 rejection because no specific modifications are identified?
2. Has the Examiner erred in combining Joffe with Brendel and Joffe with Ballard because Joffe teaches away from the combinations?

3. Has the Appellant rebutted the Examiner's rejections based on the combined teachings of the various combinations of references?

## ANALYSIS

### *Issue #1*

We are unpersuaded by Appellant's arguments that the Examiner has failed to establish a prima facie case for the various obviousness rejections. Appellant argues with respect to all obviousness rejections that the Examiner has failed to establish a prima facie case of obviousness by failing to comply with MPEP § 706.02(j) because "an explanation as to how the primary references should be modified has still not been provided in connection with any of the rejections." App. Br. 8-9. We disagree.

For each rejection under § 103, the Examiner has provided specific citations to all references relied upon, has identified a modification of the references by combining teachings of the references, and has expressed a reason for the proposed combination. *See, e.g.*, Ans. 5-6, 12-32.

[A]ll that is required of the [Patent] [O]ffice to meet its prima facie burden of production is to set forth the statutory basis of the rejection and the reference or references relied upon in a sufficiently articulate and informative manner as to meet the notice requirement of [35 U.S.C.] § 132.

*In re Jung*, 637 F.3d 1356, 1363 (Fed. Cir. 2011). We find that the Examiner has met this burden with respect to the rejection of claim 1. The Examiner has identified where Brendel shows that the recited features of providing and selecting are known but notes that Brendel does not teach the specific recited types of parameters relating to multiple paths. Ans. 5. The Examiner then reasons that Brendel's providing step would be obvious to combine with

identified teachings of Joffe disclosing parameters of multiple paths between a client and multiple servers used to select a server based on shortest network path and/or capabilities and topology of the network. Ans. 5-6. The Examiner finds that a skilled artisan would have made this combination to use resources efficiently and to respond optimally to user requests, (Ans. 6), a reason we conclude has a rational underpinning. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). Further detailed analysis of the precise modifications is not required for establishment of a prima facie case of obviousness. *Id* (“[T]he analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ”).

Appellant repeats essentially the same argument for the Examiner’s proposed combination for each rejection. *See, e.g.*, App. Br. 9-10, 12-15, 18, 20, 22-25. We disagree. In each rejection, for the reasons discussed above, we find that the Examiner has met the burden of establishing a prima facie case. *See, e.g.*, Ans. 5-6, 12-32.

#### *Issue #2*

We are not persuaded by Appellant’s arguments that Joffe teaches away from the Examiner’s proposed combination of Joffe with Brendel (App. Br. 10) and teaches away from the proposed combination with Ballard (App. Br. 25). Appellant specifically contends that Joffe at column 2, lines 44-51 teaches away from client-based load balancing. App. Br. 10. We disagree. The cited passage of Joffe does not discuss “client-based” load

balancing but rather suggests that prior load balancing techniques that required modification of a user software environment are “less desirable.” Joffe, col. 2, ll. 47-50. Moreover, “[a] reference does not teach away, however, if it merely expresses a general preference for an alternative invention but does not ‘criticize, discredit, or otherwise discourage’ investigation into the invention claimed.” *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009). In this case, we find that Joffe merely expresses a preference for an embodiment but does not criticize, discredit, or otherwise discourage the skilled artisan from trying the Examiner’s proposed combination. Thus, we find that Joffe does not teach away from the Examiner’s proposed combinations of Joffe with Brendel and Joffe with Ballard.

### *Issue #3*

We find that Appellant has failed to persuasively rebut any of the Examiner’s various obviousness rejections under § 103. Regarding the rejection of claim 1, Appellant argues that Brendel’s measurements of round trip time or latency “is a measure of network delay and does [not] constitute knowledge of the load of any server.” Reply Br. 2.<sup>1</sup> We are unpersuaded, at least, because the argument is not commensurate with the language of the claims. Claim 1 recites “providing ...values, for one or more parameters, of two or more paths” and does not limit the types of parameters to “knowledge of the load of any server” as contended by Appellant. Appellant provides no

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<sup>1</sup> We note that this is a new argument improperly presented for the first time in the Reply Brief. Regardless, we have considered the argument and find it unpersuasive.

narrowing definition of the recited values of parameters to be provided beyond the plain meaning of the claims. We therefore find that the Examiner's interpretation of the recited parameter values as reading on Brendel's round trip time and latency is broad but reasonable.

Regarding the other rejections under § 103, Appellant has not presented sufficient factual evidence to rebut the rejections. Rather, for each combination of references relied upon in the Examiner's rejections, Appellant has questioned only the reason/rationale for the combination. *See, e.g.,* App. Br. 9-10, 12-15, 18, 20, 22-25. We therefore find that Appellant has failed to provide sufficient factual evidence to rebut the Examiner's rejections based on the combined teachings of the various combinations of references.

#### DECISION

For the above reasons, the Examiner's decisions to reject claims 1-54 under § 103 are affirmed.<sup>2</sup>

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

#### AFFIRMED

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<sup>2</sup> Should this patent application proceed with further prosecution, we suggest the Examiner consider: (1) whether claims 9 and 10 are lacking antecedent bases for recitation of "the connection establishment request" and (2) whether claim 46 lacks antecedent basis for recitation of "the packet changing unit."